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Issue Date: 25 October 2005

Case No.: 2005-BLA-5100

In the Matter of:

Curtis H. Flanary,
Claimant

v.

Powell Mountain Coal Company,
Employer

And

Director, Office of Workers' Compensation Programs,
Party-In-Interest

DECISION AND ORDER
DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. Section 901 et seq. In accordance with the Act and the regulations issued thereunder, the case was referred by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of miners who were totally disabled at the time of their deaths (for claims filed prior to January 1, 1982), or to the survivors of miners whose deaths were caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as "black lung."

A formal hearing was scheduled and held before the undersigned on April 12, 2005 in Abingdon, Virginia. The Claimant and his attorney appeared, as did counsel for Employer. No one appeared on behalf of the Director. At the hearing, I admitted Director's Exhibits (DX) 1-11 and 15-40, Claimant's Exhibits (CX) 1-2, Employer's Exhibits (EX) 1-9, and ALJ Exhibits (ALJX) 1-3. The parties were allowed time in which to submit briefs; the Claimant filed a brief on October 18, 2005; the Employer filed a brief on October 17, 2005; the Director did not file a brief.

I have based my analysis on the entire record, including the exhibits and representations of the parties, and have given consideration to the applicable statutory provisions, regulations, and case law, and made the following findings of fact and conclusions of law.

JURISDICTION AND PROCEDURAL HISTORY

The Claimant, Curtis Flanary, filed his claim for benefits on June 9, 2003 (DX 2). On June 29, the Director issued a Proposed Decision and Order denying the claim, finding that the Claimant had established that he had pneumoconiosis that arose from his coal mine employment, but that he had not established that he had a totally disabling respiratory disability (DX 33). By letter dated July 27, 2004, the Claimant appealed, and requested a formal hearing (DX 35). The Director transmitted the claim to the Office of Administrative Law Judges, and a hearing was held before me in Abingdon, Virginia on April 12, 2005.

ISSUES

The issues in this case are:

1. Whether the Claimant is a miner.
2. The length of the Claimant's coal mine employment.
3. The timeliness of the Claimant's claim.
4. Whether the Claimant has pneumoconiosis.
5. If so, whether the Claimant's pneumoconiosis arose from his coal mine employment.
6. Whether the Claimant is totally disabled due to pneumoconiosis.
7. Whether the Employer is properly designated as the responsible operator.

(DX 38; Tr. 20, 21).

APPLICABLE STANDARD

Because this claim was filed after the enactment of the Part 718 regulations, the Claimant's entitlement to benefits will be evaluated under Part 718 standards. In order to establish entitlement to benefits under Part 718, the Claimant must prove that he has pneumoconiosis, that it arose out of his coal mine employment, and that the pneumoconiosis has caused him to be totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Claimant, Curtis Flanary, was born on November 24, 1928 (DX 2). He married his wife, Betty, on May 1, 1981 (DX 2). The Claimant has no children who are under 18 or dependent upon him. I find that the Claimant has one dependent, namely his wife, for purposes of augmentation of benefits.

At the hearing, the Claimant testified that he worked as a security guard, regulating the traffic that came through the gate onto the site, which included a prep plant (Tr. 23-24). There was also a railroad that took the cleaned coal out of the plant (Tr. 24). The Claimant's job including checking each vehicle as it came into the property. He testified that there was a lot of dust in the air from coal spilling out of trucks (Tr. 25-26). He worked at the gate for eight years, and then worked about four years as the supervisor of security (Tr. 27). In this position, he went from mine site to mine site, checking to see that regulations were being followed (Tr. 28). He also worked a day or so a week at the gate (Tr. 28).

The Claimant testified that he did not operate any mining equipment, or drive a coal truck. When he worked as a security guard, he spent most of his time at the gate, although he walked through the load out maybe twice a day, to see if anyone was there who was not supposed to be (Tr. 32-35). Sometimes the load out was operating, and sometimes it was not. He estimated that on an average, he spent thirty minutes a week in the load out when a train was being loaded (Tr. 36).

According to the Claimant, when he worked as a security guard, he did not leave the guardhouse if there was mining going on. On the weekends, he was the outside radio man, keeping in contact with the miners underground in case they needed help (Tr. 39-40). He also checked on the office and supply buildings, but he did not go underground (Tr. 41-42).

As a security supervisor, the Claimant worked in an office in the main building, and took care of the schedule (Tr. 43). His job was to make sure that regulations were being followed. For example, he made sure that gates were closed, that the men were wearing hard toed shoes and hard hats (Tr. 44-45). He did not operate any equipment other than a truck he used to get around the property (Tr. 45). He had no responsibilities underground (Tr. 46).

The Claimant testified that he uses oxygen at night, and when he over-exerts himself. His treating physician is Dr. Jeff Farrow. The Claimant smoked a pack a day for about 20 years, and quit in the late 1960s (Tr. 29).

Status as Miner/Length of Coal Mine Employment

As a preliminary matter, I must determine whether the Claimant's work as a security guard and supervisor qualifies as coal mine employment under the Act. The regulations at §725.101(a)(19) provide:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see §725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. §725.101(a)(19) (2001). In addition, the regulations at §725.202(a) provide a rebuttable presumption that certain individuals are miners:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> >
> > (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. §725.202(a) (2001).

The Board has established a three prong test to determine whether a worker is a "miner" within the meaning of the Act. *Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985) The worker must prove that: (1) the coal was still in the course of being processed and was not yet a finished product in the stream of commerce (**status**); (2) the worker performed a function integral to the coal production process, *i.e.*, extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (**function**); and (3) the work that was performed, occurred in or around a coal mine or coal preparation facility (**situs**). The Sixth Circuit, in which this claims arises, has employed a two-prong, function-situs test in determining whether a worker qualifies as a miner under the Act. *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 485 (6th Cir. 1988).

The Claimant's testimony, which I found to be credible, establishes that he worked on a site where there was active underground mining, as well as coal preparation and loading in trucks and railroad cars. Thus, he has satisfied the situs prong of the analysis. The function prong of the Board's test requires that the individual's work contribute to the extraction and preparation of coal. This requirement is satisfied if the individual's activities are found to be an integral or necessary part of the overall coal extraction process. *Canonico v. Director, OWCP*, 7 B.L.R. 1-547 (1984); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979).

Clearly the Claimant's job duties did not involve the extraction or preparation of coal. However, for the eight years that he worked as a security guard, he was responsible for regulating traffic in and out of the site, and checking the vehicles that came into the site. I find that that these duties, which involved the regulation of the trucks that came through to be loaded with coal, were a necessary part of the overall coal extraction and preparation process. In the four years that the Claimant worked as the supervisor of security, his duties included checking to see that regulations were being followed at the mine site, and keeping in contact with the underground miners in case they needed assistance. These duties clearly related to the health and safety of the miners engaged in the extraction process, and I find that the Claimant's duties were a necessary part of the overall coal extraction process. See, e.g., *Moore v. Duquesne Light Co.*, 4 B.L.R. 1-40 (1981.

However, an individual must spend a "significant portion" of his time at a coal mine site to meet the situs test. Thus, in *Musick v. Norfolk and Western Railway Co.*, 6 B.L.R. 1-862 (1984), the Board held that six to eight weekends per year was not a significant portion of the claimant's work time, and he was, therefore, neither a coal miner nor a coal transportation worker for the period during which he performed such work.

The Claimant testified that during the time he worked as a security guard, he spent most of his time at the gate. He testified that he did not leave the guardhouse if there was mining going on. He did walk through the load-out perhaps twice a day; sometimes the load-out was operating, but sometimes it was not. The Claimant testified that on average, he was in the load-out thirty minutes a week when a train was being loaded. This adds up to approximately 26 hours a year, or a little over three working days. I find that this did not constitute a significant portion of the Claimant's work time, and therefore that his work as a security guard does not qualify him as a coal miner.[1]

During the four years that he worked as a security supervisor, the Claimant was in an office in the main building. In addition to taking care of the schedule, he made sure that regulations were followed, for example, that the gates were closed, and the miners were wearing hard toed shoes and hard hats. But he did not operate any equipment other than a truck he used to get around the property, and he had no responsibilities underground. Although he testified that he went from mine site to mine site to check that regulations were being followed, he did not indicate how much time he actually spent at the mine sites, or whether they were in operation when he visited them. But it is clear from the Claimant's testimony that his duties did not involve any work underground. I find that the evidence does not establish that the Claimant spent a significant portion of his time as a security supervisor in or around a coal mine or preparation facility.

I find that the Claimant was not a "miner" for purposes of the Act. However, I have also reviewed the medical evidence, and I find that, even if the Claimant were to establish that his work as a security guard and supervisor qualified as coal mining employment, he would not be entitled to benefits under the Act.[2]

Medical Evidence

The following medical evidence is in the record.

X-ray Evidence[2]

[1] The Claimant testified that when he worked at the gate, there was a lot of dust in the air from coal spilling out of the trucks. Although the Claimant was not specific, the reasonable inference is that this was coal that had been processed and loaded into the trucks, and was on its way out of the site to the consumer. Thus, this coal was already processed and in the stream of commerce.

[2] The Employer has challenged the timeliness of the Claimant's claim. The regulations provide a rebuttable presumption that a claim is timely filed, and the Employer has not pointed to any evidence to rebut this presumption. I find that the Claimant's claim was timely filed.

[3] B-B reader; and BCR - Board Certified Radiologist. These designations indicate qualifications a person may possess to interpret x-ray film. A "B Reader" has demonstrated proficiency in assessing and classifying chest x-ray evidence for pneumoconiosis by successful completion of an examination. A "Board Certified Radiologist" has

Exhibit No.	*Date of X-ray*	*Reading Date*	*Physician/ Qualifications*	*Impression*
DX 11	7-3-03	7-31-03	Burnett/B, BCR	Quality only
EX 5	7-3-03	11-7-03	Poulos/B, BCR	Negative for pneumoconiosis
DX 11	7-3-03	7-3-03	Forehand/B	1/0, s,
EX 3	8-20-03	8-20-03	Dahhan/B	Negative for pneumoconiosis
EX 1	9-15-03	9-15-03	Rosenberg/B	1/1, s, t
DX 13	11-18-03	11-18-03	Patel/B, BCR	1/1, s, t
EX	11-18-03	6-15-05	Halbert/B	Negative for pneumoconiosis

Pulmonary Function Studies

Exhibit No.	*Date*	*Age/Ht*	*FEV1*	*FVC*	*MVV*	*Effort*
DX 11	7-3-03	74/69”	2.73	3.31	58	Good
DX 14	8-20-03	74/178 cm	2.56 2.55*	3.04 3.11*	55 28*	Good
EX 1	9-15-03	74/71”	2.58	3.09	68	Good
DX 13	11-18-03	74/70”	2.74 2.76*	3.35 3.49*		

* results after administration of bronchodilator

Arterial Blood Gas Studies

Exhibit No.	*Date*	*Physician*	*pCO2*	*pO2*	*At rest/exercise*
DX 11	7-3-03	Forehand	38 38	62 48	At rest During exercise
DX 14	8-20-03	Dahhan	45.9 43.8	69 73.5	At rest End of exercise

been certified, after four years of study and an examination, as proficient in interpreting x-ray films of all kinds including images of the lungs.

Exhibit No.	*Date*	*Physician*	*pCO2*	*pO2*	*At rest/exercise*
EX 1	9-15-03	Rosenberg	41.2	83	At rest
DX 13	11-18-03	Rasmussen	44 46	71 53	At rest Peak exercise

Medical Opinion Evidence

Dr. J. Randolph Forehand

Dr. Forehand examined the Claimant on July 3, 2003 at the request of the Department of Labor (DX 11). Dr. Forehand noted the Claimant's employment history, as well as his family and medical history, and symptoms. On examination of the Claimant, Dr. Forehand noted scattered crackles at the left base on auscultation. Dr. Patel interpreted the Claimant's x-ray as positive for pneumoconiosis. Pulmonary function testing showed a normal ventilatory pattern; arterial blood gas studies showed hypoxemia.

Based on the Claimant's history of coal dust exposure, the results of his examination, and his x-ray and arterial blood gas study results, Dr. Forehand concluded that he has coal workers' pneumoconiosis, as a result of his exposure to coal dust. Dr. Forehand stated that the Claimant had a severe respiratory impairment, and insufficient residual oxygen transport capacity to continue in his last coal mining job. According to Dr. Forehand, the Claimant is totally and permanently disabled, and coal workers' pneumoconiosis is the sole factor contributing to his respiratory impairment.

Dr. David Rosenberg

Dr. Rosenberg examined the Claimant at the Employer's request on September 15, 2003 (EX 1). He reported the Claimant's medical and work history, as well as his symptoms. On examination of the Claimant, Dr. Rosenberg noted equal expansion of the chest, and bilateral persistent rales at the bases. Dr. Rosenberg also performed pulmonary function and arterial blood gas studies, and a chest x-ray. The pulmonary function tests showed mild restriction, and the resting blood gas results were normal. The x-ray showed linear opacities in the mid and lower zones, with a profusion of 1/1. The Claimant reported shortness of breath, worsening over the past few years. He had a history of coronary artery disease, and bypass surgery more than 20 years earlier.

Dr. Rosenberg concluded that the Claimant had linear interstitial lung disease, associated with restriction, bibasilar rales, and some clubbing. However, he stated that the linear character of the interstitial lung disease, and its overall lower lung field distribution and clubbing are not findings seen with coal workers' pneumoconiosis. As the Claimant did not have asbestos exposure or rheumatoid arthritis, Dr. Rosenberg was concerned that he had idiopathic pulmonary fibrosis. He suggested a CT scan.

Dr. Rosenberg stated that functionally, the Claimant has mild restriction, with a normal diffusing capacity corrected for lung volumes. As the restriction is above disability standards, the Claimant could perform his security job. Dr. Rosenberg stated:

> Mr. Flanary's impairment does relate to and has not been hastened by the past inhalation of coal mine dust exposure or the presence of CWP. It obviously relates to the underlying and currently undefined interstitial lung disease that he has.

Dr. Rosenberg concluded that the Claimant does not have pneumoconiosis or associated impairment, although he "obviously" has interstitial lung disease. However, this idiopathic pulmonary fibrosis bears no relationship to his past inhalation of coal mine dust.

Dr. Rosenberg testified by deposition on April 8, 2005 (EX 2). He stated that, although he marked his ILO form 1/1, it was not positive "in the strict sense" for pneumoconiosis, because there was no micronodularity. He stated that the x-ray was positive for pneumoconiosis "in general," but that there were also other conditions that could cause the same kind of findings; it was "not really" pneumoconiosis. Thus, he classified it as pneumoconiosis "in the global sense." However, it was not related to the inhalation of coal mine dust.

According to Dr. Rosenberg, when coal dust exposure causes pneumoconiosis, it forms micronodules or small rounded opacities in the upper lung zones. Here, there are linear changes in the lower and middle lung zones; thus, this abnormality is related to a linear interstitial lung disease that does not represent coal dust exposure. The Claimant also had clubbing, which is not related to coal dust exposure, but to other forms of linear interstitial lung disease.

Dr. Rosenberg cited to an article published by Dr. Kleinerman about 1978, stating that the coal macule forms in and around the terminal bronchioles. But linear interstitial fibrotic lung disease is not part of the pathologic findings of coal dust exposure. Dr. Rosenberg also stated that there were no animal modes that demonstrate that coal dust exposure causes linear interstitial fibrotic lung disease. There are some "uncontrolled" publications in the medical literature that mention interstitial linear changes of coal dust exposure, but they did not control other factors such as smoking that could cause these changes. Thus, overall, there was no evidence that an interstitial lung disease with linear changes is related to coal dust exposure.

According to Dr. Rosenberg, there are 200 different causes of interstitial lung disease. While the pulmonary function tests and examination showed that the Claimant has restriction, it is related to a linear form of interstitial lung disease, as opposed to a micronodular disease. He also felt that the Claimant's desaturation with exercise is consistent with linear interstitial lung disease.

Dr. Rosenberg testified that idiopathic pulmonary fibrosis refers to some kind of inflammation of the immune system that causes inflammation within the lungs; it is not related to coal dust exposure.

Dr. Rosenberg also reviewed the reports by Dr. Dahhan and Dr. Rasmussen, noting that the evaluations were generally the same, with the main difference being that the p02 obtained by Dr. Rasmussen and Dr. Forehand fell to a disabling level with exercise.

In Dr. Rosenberg's opinion, the Claimant is disabled from a respiratory or pulmonary standpoint, but it is not related to his coal dust exposure.

Dr. A. Dahhan

Dr. Dahhan examined the Claimant at the Employer's request on August 20, 2003 (EX 3). He noted the Claimant's medical and occupational histories, as well as his symptoms. On examination of the Claimant, Dr. Dahhan noted good air entry to both lungs, with no crepitations, rhonchi, or wheeze. The Claimant's arterial blood gas study at rest showed normal values. His results after the end of exercise also showed normal values. Pulmonary function testing showed a mild obstructive ventilatory defect. The Claimant's x-ray showed cardiac enlargement with post mediastinotomy changes, but otherwise clear lung fields, with no pleural or parenchymal abnormalities consistent with pneumoconiosis.

Dr. Dahhan concluded that there was no evidence of occupational pneumoconiosis or pulmonary disability due to coal dust exposure, and that the Claimant retained the respiratory capacity to continue his previous coal mining job or similar work. He noted that the Claimant has coronary artery disease and hyperlipidemia, conditions of the general public not caused by or related to inhalation of coal dust or pneumoconiosis.

Dr. Dahhan also testified by deposition on December 17, 2003 (DX 14). He stated that the Claimant's resting arterial blood gas value was slightly low, but his exercise value was not, indicating slight impairment in blood gas oxygenation at rest that subsides with exercise. Dr. Dahhan felt that this was due to his heart condition and previous heart surgery. He did not think that the Claimant has pneumoconiosis, or a pulmonary disability.

Dr. D.L. Rasmussen

Dr. Rasmussen examined the Claimant on November 18, 2003 (DX 13). He reported the Claimant's medical and occupational histories, as well as his symptoms. On examination of the Claimant, he noted normal chest expansion and diaphragmatic excursions, and minimally reduced breath sounds. He heard many find bilateral Velcro inspiratory crackles in the mid lung zones. The Claimant's x-ray was read by Dr. Patel as 1/1, s, t. Pulmonary function study results were normal, with a minimally reduced total lung capacity, and a moderately to markedly reduced single breath carbon monoxide diffusing capacity. The resting arterial blood gas study results were also normal.

The Claimant underwent exercise arterial blood gas studies, which showed marked increase in VD/VT ration, and marked impairment in oxygen transfer and hypoxemia. According to Dr. Rasmussen, the studies indicate marked loss of lung function, and the Claimant does not retain the pulmonary capacity to perform his last coal mine job.

Dr. Rasmussen noted that the Claimant had a minimal history of exposure to coal mine dust, and x-ray changes consistent with pneumoconiosis. He felt that on this basis, the Claimant possibly had pneumoconiosis. The Claimant also had x-ray changes, and physical and physiologic changes consistent with diffuse interstitial pulmonary fibrosis. According to Dr. Rasmussen, there are several possible risk factors for the Claimant's disabling lung disease, including non-occupational idiopathic and diffuse interstitial fibrosis. He noted that the Claimant had a history of farm work, which could lead to "farmer's lung," but there was no historical evidence of respiratory symptoms 30 or more years ago. The Claimant's 12 year employment as a security guard at a coal mine, with exposure to road dust and some coal dust could be an etiologic factor, or could have caused pneumoconiosis and aggravated his disease process. Dr. Rasmussen felt that coal mine dust exposure could have contributed, if only minimally.

But based on the Claimant's history of onset of symptoms of only 2 to 3 years duration, Dr. Rasmussen felt that he likely had idiopathic diffuse interstitial fibrosis.

Dr. Matthew A. Vuskovich

Dr. Vuskovich reviewed the pulmonary function studies performed by Dr. Forehand on July 3, 2003 (DX 16). He concluded that these studies were valid. He also reviewed the arterial blood gas studies of that date, stating that a "true" p02 value of 48 would more likely be seen in a hospital intensive care unit, monitoring patients with acute imminent life threatening conditions such as heart failure and/or pulmonary edema. He felt that the most likely explanation for the low p02 value was that the sample was venous blood instead of arterial blood. Dr. Vuskovich determined that, based on the pulmonary function results, the Claimant "more likely than not" had the pulmonary capacity to continue working in the coal industry, even if he were diagnosed with pneumoconiosis.

Dr. Vuskovich also reviewed the testing results obtained by Dr. Rasmussen on November 18, 2003 (DX 15). He determined that the spirometry results were valid, although Dr. Rasmussen incorrectly used Crapo reference values. According to Dr. Vuskovich, the resting arterial blood gas values over 60 are crude measures of pulmonary function; they can be affected by many non-pulmonary factors, including heart pump attenuation, obesity, breath holding, hyperventilation, and position. The Claimant's resting value was over 60. Based on these test results, Dr. Vuskovich determined that the Claimant had the pulmonary capacity to continue to work in the coal mining industry, even if he were diagnosed with pneumoconiosis.

Dr. Vuskovich testified by deposition on April 6, 2005 (EX 6). He testified that the pulmonary function studies performed on July 3, 2003 did not show any pulmonary impairment. The resting arterial blood gas results were low, but the post-exercise values were extremely low. He felt that this was not appropriate "in a setting of a clinic," and that if the values were this low, they should have called 911, as it was a serious life-threatening condition. According to Dr. Vuskovich, the values do not fit with any type of physiologic phenomenon. Thus, he felt that, "more likely than not," there was an error in drawing the blood. He stated that the values were more in line with venous blood, not arterial blood. He thought Dr. Forehand's machine was "a little wacky."

In reviewing Dr. Dahhan's August 20, 2003 study, Dr. Vuskovich felt that it was "more physiologic," as it showed a normal physiological response. He also felt that the results obtained by Dr. Rosenberg were normal, with a resting p02 in the usual range for a man of the Claimant's age. Dr. Vuskovich felt that the pulmonary function study values obtained by Dr. Rasmussen were valid.

Dr. Vuskovich converted the values obtained by Dr. Rasmussen and Dr. Forehand on pulmonary function tests from Crapo values to Knudson values.

In discussing the arterial blood gas results obtained by Dr. Rasmussen, Dr. Vuskovich described the test as a "very crude measure" of pulmonary function, and noted that it was relatively normal.

Dr. Vuskovich testified that, in determining if the Claimant has respiratory or pulmonary disability, the resting results of Dr. Rasmussen, as well as the post-exercise results obtained by Dr. Dahhan, should be used. He felt that the only way to explain the results obtained by Dr. Forehand was to assume a technician error of drawing venous rather than arterial blood. He felt that if there were such an incredible drop in the p02, the pc02 would have had to "skyrocket."

DISCUSSION

Existence of Pneumoconiosis

Pneumoconiosis is defined, by regulation, as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201. The regulations at 20 C.F.R. § 718.203(b) provide that, if it is determined that the miner suffered from pneumoconiosis and has engaged in coal mine employment for ten years or more, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. If, however, it is established that the miner suffered from pneumoconiosis but worked less than ten years in the coal mines, then the Claimant must establish causation by competent evidence. *Stark v. Director, OWCP,*9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.,*9 B.L.R. 1-137 (1986). The Board has held that the burden of proof is met under 718.203(c) where "competent evidence establish(es) that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP,* 11 B.L.R. 1-1101-112 (1987). Specifically, the record must contain *medical* evidence to demonstrate causation. *Baumgartner v. Director, OWCP,* 9 B.L.R. 1-65, 1-66 (1986)(administrative law judge cannot infer causation based solely upon claimant's employment history); *Tucker v. Director, OWCP,* 10 B.L.R. 1-35, 1-39 (1987)(it was error for the administrative law judge to rely solely upon lay testimony to find causation established). The Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See, Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251 (1995).

Because the current claim was filed after the enactment of the Part 718 regulations, the evidence will be evaluated under standards found in 20 C.F.R. Part 718. The existence of

pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a). I have independently assessed the evidence under each of these methods.

To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

In this case, there are six interpretations of four x-rays, all performed in the year 2003. The first x-ray was read as positive by Dr. Forehand, who is a B reader, but as negative by Dr. Poulos, who is dually qualified. Given Dr. Poulos' superior qualifications, I find that this x-ray is negative for pneumoconiosis. Even if I did not weigh the respective qualifications, these interpretations would be in equipoise, and thus the x-ray would not be positive for pneumoconiosis.

The next x-ray was performed on August 20, 2003. It was read as negative by Dr. Dahhan; there are no contrary interpretations.

The next x-ray, performed on September 15, 2003, was interpreted as positive by Dr. Rosenberg, who is a B reader.[3] Thus, I find that this x-ray is positive for pneumoconiosis.

Finally, Dr. Patel, who is dually qualified, interpreted the Claimant's November 18, 2003 x-ray as positive for pneumoconiosis; Dr. Halbert, who is a B reader, interpreted it as negative. Given Dr. Patel's superior qualifications, I find that this x-ray is positive for pneumoconiosis.

Thus, the four x-rays are evenly balanced, with two being positive for pneumoconiosis, and two negative. I find that the x-ray interpretations are in equipoise, and thus not positive for the existence of pneumoconiosis.[4] Accordingly, I find that the Claimant has not established the existence of pneumoconiosis by a preponderance of the x-ray evidence.

There is no autopsy or biopsy evidence to consider, and thus the Claimant has not established the existence of pneumoconiosis under § 718.202(a)(2).

Under § 718.202(a)(3), a determination of the existence of pneumoconiosis may also be made by using the presumptions set out in §§ 718.304, 305, or 306. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because it applies only to claims filed before January 1, 1982. Section 718.306 is only applicable in the case of a deceased miner. Since none of these presumptions is applicable, the existence of pneumoconiosis is not established under § 718.202(a)(3).

[3] Dr. Rosenberg stressed in his narrative that this x-ray was in fact not positive for pneumoconiosis.

[4] Even acknowledging that pneumoconiosis is a progressive condition, I cannot rely on the fact that the interpretation of the latest x-ray is positive for pneumoconiosis: only a little more than four months separates the first and the last x-rays.

Claimant can also establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See, Hoffman v. B&G Construction Co.,* 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.,* 7 B.L.R. 1-295 (1984). A report which is better supported by the objective medical evidence of record may be accorded greater probative value. *Minnich v. Pagnotti Enterprises, Inc.,* 9 B.L.R. 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP,*8 B.L.R. 1-139 (1985).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra.* Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder of fact to decide. *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 1-149 (1989)(en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP,* 11 B.L.R. 1-135 (1988). An equivocal opinion, however, may be given little weight. *Justice v. Island Creek Coal Co.,* 11 B.L.R. 1-91 (1988); *Snorton v. Zeigler Coal Co.,* 9 B.L.R. 1-106 (1986).

In evaluating conflicting medical reports, as with x-ray analysis, it may be appropriate to give more probative weight to the most recent report. *Clark v. Karst-Robbins Coal Company,* 12 BLR 1-149 (1989)(en banc). At the same time, "recency" by itself may be an arbitrary benchmark. *Thorn v. Itmann Coal Company*, 3 F.3d 713 (4th Circuit 1993). Finally, a medical opinion may be given little weight if it is vague or equivocal. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Circuit 1995) and *Justice v. Island Creek Coal Company,* 11 BLR 1-91 (1988).

Dr. Forehand, who examined the Claimant for the Department of Labor, concluded that he has pneumoconiosis, based not just on his x-ray results, but on the results of his arterial blood gas studies, which showed hypoxemia.

Dr. Rasmussen also examined the Claimant, reviewed Dr. Patel's positive x-ray interpretation, and obtained arterial blood gas studies similar to those obtained by Dr. Forehand. Thus, the Claimant's arterial blood gas studies during exercise showed marked impairment in oxygen transfer and hypoxemia, and indicate a marked loss of lung function. Dr. Rasmussen stated that the Claimant does not retain the pulmonary capacity to perform his previous coal mine job. He felt that, given his minimal history of exposure to coal mine dust, as well as his x-ray changes consistent with pneumoconiosis, the Claimant *possibly* had pneumoconiosis. But he also felt that the x-ray changes, as well as the Claimant's physical and physiologic changes, were consistent with diffuse interstitial pulmonary fibrosis, for which there are several risk factors, such as the Claimant's history of farm work. Although he acknowledged that the Claimant's exposure to coal dust *could be* an etiologic factor in his respiratory impairment, he felt that, based on his two to three year onset of symptoms, he likely has idiopathic diffuse interstitial fibrosis.

Dr. Rosenberg, who examined the Claimant at the Employer's request, also concluded that, although the Claimant's x-ray showed pneumoconiosis "in the global sense," this pneumoconiosis was not related to the inhalation of coal dust, but to a linear interstitial lung disease not related to coal dust exposure. He cited to the linear changes on x-ray, as well as the Claimant's clubbing, which is related to forms of interstitial lung disease other than coal dust exposure-related. Dr. Rosenberg referred to a medical article indicating that linear interstitial fibrotic lung disease is not part of the pathologic findings of coal dust exposure. Noting that there are 200 different causes of interstitial lung disease, Dr. Rosenberg concluded that the Claimant's restriction and desaturation with exercise were consistent with linear interstitial lung disease, as opposed to micronodular disease. He indicated that a diagnosis of idiopathic pulmonary fibrosis refers to an inflammation of the immune system that causes inflammation within the lungs, but it is not related to coal dust exposure.

Dr. Dahhan concluded that the Claimant does not have pneumoconiosis, based on his negative x-ray, and the results of pulmonary function and arterial blood gas studies.

I place most reliance on the report by Dr. Rosenberg, which I find to be thorough, well reasoned, and supported by the objective medical evidence of record. Dr. Rosenberg explained why the findings on x-ray, as well as the results of examination and testing, were not consistent with the changes caused by coal dust exposure. His conclusion that the Claimant suffers from idiopathic interstitial fibrosis is consistent with Dr. Rasmussen's conclusions. Taking into account the Claimant's minimal history of exposure to coal mine dust, and his x-ray changes consistent with pneumoconiosis, Dr. Rasmussen could only state that the Claimant *possibly* had pneumoconiosis. However, he also felt that the x-ray changes, as well as the Claimant's physical and physiologic changes, were consistent with diffuse interstitial pulmonary fibrosis, for which he cited several risk factors, such as the Claimant's history of farm work. Indeed, while he conceded that the Claimant's exposure to coal dust *could be* an etiologic factor in his respiratory impairment, based on his two to three year onset of symptoms, Dr. Rasmussen concluded that he likely has idiopathic diffuse interstitial fibrosis.

I am not persuaded otherwise by Dr. Forehand's opinion that the Claimant has pneumoconiosis, based on the results of his x-ray and arterial blood gas studies. I note that I have concluded that the x-ray evidence is not positive for pneumoconiosis. In addition, Dr. Vuskovich, who reviewed the blood gas study results obtained by Dr. Forehand, stated that the exercise values were way out of line, and were more likely the result of drawing venous blood, not arterial blood. In any event, Dr. Forehand did not offer further explanation or reasoning for his summary conclusions. Nor did he address the linear character of the changes on the Claimant's x-ray, or the physical changes referred to by Dr. Rosenberg and Dr. Rasmussen.

Thus, according significant weight to Dr. Rosenberg's opinions, as supported by Dr. Rasmussen's, I find that the Claimant has not established the existence of pneumoconiosis by a preponderance of the medical opinion evidence.

Finally, I have weighed all of the evidence under § 718.202(a), including the x-ray evidence, and I find that the Claimant has met his burden to establish that he has

pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000).

CONCLUSION

The Claimant is not a miner for purposes of entitlement to benefits under the Act. But even if he were, he has not established by a preponderance of the medical evidence that he has pneumoconiosis, and he is therefore not entitled to benefits under the Act.

ORDER

Based on the foregoing, the claim of Curtis H. Flanary for benefits under the Act is hereby DENIED.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge

ATTORNEY'S FEES

The award of an attorney's fee is permitted only in cases in which the Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any attorney's fee to the Claimant for legal services rendered in pursuit of this claim.

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).